Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

MONSANTO COMPANY, ALLIED-SIGNAL, INC.
AND EM INDUSTRIES, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
SOUTH CAROLINA DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

George C. Freeman, Jr.
(Counsel of Record)
Alfred R. Light
Thomas E. Knauer
Hunton & Williams
707 E. Main St.
Richmond, Virginia 23212
(804) 788-8363

May 26, 1989

TABLE OF CONTENTS

Mandatory Bifurcation 1

The Burden of Proof 4

The Implications of the Secret Settlements 7

Conclusion 10

Appendix A-1

TABLE OF AUTHORITIES

Chan v. Korean Air Lines, 109 S.Ct. 1676 (1989) 7

Kelly v. United States, 23 Env't Rep. Cas. (BNA) 1500 (W.D. Mich. 1985) 4

Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) 1

Mola Development Corp. v. United States, No. CV82-0819-RMT (C.D. Cal. May 5, 1986) 4

United States v. Distler, No. 88-0201-L (J) (W.D. Ky. Feb. 2, 1989) 3

United States v. Halper, 109 S.Ct. 1892 (1989) 10

United States v. Monsanto, 858 F. 2d 160 (4th Cir. 1988) 2

United States v. Seymour Recycling Corp., 686 F. Supp. 696 (S.D. Ind. 1988) 3

United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D. S.C. 1985) 8

Statutory Provisions

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), *as amended by* Superfund Amendments and Reauthorization Act ("SARA") Pub.L. No. 99-499, 100 Stat. 1613 (1986), 42 U.S.C. §§ 9601-9675 (1982 & Supp. IV 1986) ..... passim

Section 101(21), 42 U.S.C. § 9601(21) (1982 & Supp. IV 1986) 7

Section 107(a), 42 U.S.C. § 9607(a) (Supp. IV 1986) 7

Section 107(a)(3), 42 U.S.C. § 9607(a)(3) (Supp. IV 1986) 5
Section 107 (b)(3), 42 U.S.C. § 9607(b)(3) (Supp. IV 1986) 5
Section 113(f), 42 U.S.C. § 9613(f) (1982 & Supp. IV 1986) 3
Section 113(f)(1), 42 U.S.C. § 9613(f)(1) (1982 & Supp. IV 1986) 1,7
Section 113(f)(2), 42 U.S.C. § 9613(f)(2) (1982 & Supp. IV 1986) 3,7
Section 114(b), 42 U.S.C. § 9614(b) (1982 & Supp. IV 1986) 8

Rules

Federal Rules of Civil Procedure 2
Rule 54(b) 2,3,4,9

Miscellaneous

6 J. Moore, Federal Practice (2d ed. 1988)
¶ 54.28[2] 2
¶ 54.33[2] 1
¶ 54.42 2

G. Orwell, *Animal Farm* (1945) 6

Restatement (Second) of Torts (1985) 4,5
Section 433A 5,6
Section 433A, comment g 5
Section 433B 5
Section 433B, comment d 5

126 Cong. Rec. 30932 5

PETITIONERS' REPLY BRIEF

Pursuant to Rule 22.5, Petitioners respond to (1) Respondents' restatement of the questions presented, (2) their allegation that the district court treated Petitioners "claims" against the plaintiffs as "abandoned", (3) their claim for preferential treatment simply because the Government was a plaintiff and (4) the implications of both governments' disclosures of their heretofore secret settlements with each other and their agencies.

The Government's rewording of the questions presented shows that it has no substantial defense on the merits to Petitioners' arguments.

Mandatory Bifurcation

The Government recasts Petitioners' first question to imply that Petitioners argue that, as an abstract matter, courts do not have the power to mandate bifurcation of CERCLA liability and contribution issues into two separate trials. That is a straw man. Petitioners' primary argument is that where the plaintiff also contributed to the harm, the defendant may assert the plaintiff's share in causing the harm as a defense to the scope of defendant's liability. This defense is not a severable contribution claim. The court erred in treating Petitioners' partial defenses as separate "claims" which did not have to be considered prior to entry of final judgment. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 743-44 (1976); 6 J. Moore, Federal Practice ¶ 54.33[2] (2d ed. 1988).

Bifurcation into separate suits was also inappropriate in this case for three other reasons. First, CERCLA actions are equitable proceedings and, as Judge Widener said in his dissent, it is the "universal and unvarying rule that the court will decide all matters in dispute and decree complete relief." Second, CERCLA § 113(f)(1) also commands that:

> . . . since the matter was brought before the district court, that court had no discretion but to decide the question. To repeat, the discretion is

> in the party to make the claim, not in the district court to defer decision.

Widener, J., dissenting, 858 F.2d at 177. Pet. App. B-29. Third, bifurcation into two separate suits was inappropriate because the plaintiffs were also "responsible parties" under CERCLA and, applying traditional principles of common law, since they did not carry the burden of apportionment, defendants should not have been held liable for all of the costs.

Petitioners' additional, "fall back," argument is that even if their assertion of plaintiffs' contribution to the harm must be regarded as a "claim," while the court had discretion to require two separate trials, its discretion was limited by the Federal Rules of Civil Procedure. The Government concedes that the court did not make the required certification under Rule 54(b), *e.g.*, "that there is no just reason for delay," prior to entry of final judgment. U.S. Br. 10 n.7. Absent this requisite determination, the judgment of the court of appeals would remain interlocutory however it might be styled. 6 J. Moore, Federal Practice ¶¶ 54.28[2], 54.42 (2d ed. 1988). The "judgment" would not be a final judgment within the meaning of the Federal Rules and the court of appeals would have lacked jurisdiction to hear the appeal, as the United States concedes. U.S. Br. 10 n.7.[1]

---

[1] The Government itself invoked the appellate jurisdiction of the Fourth Circuit in a cross-appeal not the subject of this petition. *See United States v. Monsanto*, 858 F. 2d 160, 175 (4th Cir. 1988) (Pet. App. B-26).. But it never moved to dismiss the counterclaims for contribution or referred to them in the order it drafted for the district court to which it refers. U.S. Br. 6 n.3 (referring to Pet. App. G-3). Below, the Government argued, "To the extent that the generators can be said to have presented contribution claims to the district court, they were clearly denied, without prejudice to their assertion in a later action, in the district court's order of February 23, 1984 . . . That ruling, of course, was incorporated in the final judgment." Joint Answer of the United States and South Carolina Department of Health and Environmental Control to Petitions for Rehearing and Suggestion for Rehearing in Banc, *United States v. Monsanto*, Nos. 86-1261(L), 86-1263, 86-1265 (4th Cir., filed Oct. 8, 1988), at 11 n.4. Having deferred consideration of contribution claims to a separate action in the 1984 order it drafted for the district court, the Government apparently saw no need to refer to them in the later order, which it also drafted.

Respondents struggle in separate ways to solve the Rule 54(b) dilemma that they themselves have created by their mischaracterization of Petitioners' defense as a separate claim. South Carolina asserts that the Rule 54(b) issue should not be considered because it was not raised by Petitioners when the plaintiffs moved for summary judgment on costs issues in the district court.[2] The Government asserts for the first time that the district court treated Petitioners' claims as effectively abandoned. U.S. Br. at 6 n.3, 10 n.7; *see* S.C. Br. 10. But these assertions are without support in the record.

The Government itself drafted the language in the district court's orders which the Government refers to in its footnote 3. In the Fourth Circuit, Respondents argued that the district court had deferred Petitioners' "counterclaims" to a subsequent separate contribution action. The district court's refusal to decide the contribution questions was a major subject of the briefs in the Fourth Circuit, including Petitioners' contention that such deferral was improper under Rule 54(b).[3] The Government's imaginative "abandonment" argument is simply a thinly veiled attempt to reconstruct the district

---

[2] S.C. Br. 9. South Carolina also argues that defendants are not prejudiced because they did not sue third parties for contribution. S.C. Br. 10. But the plaintiffs had settled with most of the private defendants against whom the defendants might have made claims in contribution and who had made substantial contribution of wastes to the Bluff Road site. Assertion of claims against these parties would have been futile. *See* 42 U.S.C. § 9613(f)(2). Their equitable obligations are properly assigned to the plaintiffs under CERCLA § 113(f), but that is a result the plaintiffs seek to avoid by the "two trial" procedure ordered below and the settlements they reveal for the first time in their Briefs in Opposition in this Court.

[3] The Government litigates cases under CERCLA in federal district courts throughout the nation. As plaintiff, the Government frequently moves for severance and/or stay of claims for contribution and indemnity. In some cases, the Government argues (as it did here below) that the district court *must* under the statute dismiss contribution claims for trial in subsequent actions. *United States v. Distler*, No. 88-0201-L(J) (W.D. Ky. Feb. 2, 1989) (App. A-1). In other cases, the Government argues, inconsistently, that a district court *cannot* under the statute dismiss contribution claims as unripe. *United States v. Seymour Recycling Corp.*, 686 F. Supp. 696 (S.D. Ind. 1988). The United States, as a CERCLA defendant, argues *for* impleader and *against* separate trials of the CERCLA plaintiffs' claims against it. *See* U.S. Br. 12 n.9

court opinions it previously drafted in order to avoid issues, which on reflection it now finds inconvenient to address. Moreover this "abandonment" argument is inconsistent with other arguments in the Government's brief. Later the Government attempts to distinguish cases cited by Petitioners on the grounds that they do not discuss "deferral," the issue involved here, but instead involve various courts' refusal "to dismiss some counterclaims against the governmental plaintiffs based on alleged governmental involvement at the waste site." U.S. Br. 12 n.9.

The Burden of Proof

The Government would have the Court collapse Petitioners second and third questions into a single, second question in order to avoid (1) the Congressional guideline for determining when joint and several liability is appropriate under CERCLA, "principles of traditional and evolving common law," and (2) the application of the *Restatement (Second) of Torts*. All parties agree that the statute itself is silent as to when joint and several liability is appropriate and who has the burden of proof under what circumstances. Turning to the legislative history, both Petitioners and Respondents have cited the floor statement of Senator Randolph, one of the principal sponsors of the Senate compromise in 1980. Here is what Senator Randolph actually said:

> [w]e have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.
>
> * * *
>
> It is intended that issues of liability not resolved by this act, if any, shall be governed by the traditional and evolving principles of common

---

(discussing *Mola Development Corp. v. United States*, No. CV82-0819-RMT (C.D. Cal. May 5, 1986)); *Kelly v. United States*, 23 Env't Rep. Cas. (BNA) 1500, 1503 (W.D. Mich. 1985).

> law. An example is joint and several liability. Any reference to these terms have been deleted, and liability of joint tort feasors will be determined under common or previous statutory law.

126 Cong. Rec. 30932 (1980); 126 Cong. Rec. S14964, (daily ed. November 24, 1980). Following this guidance, numerous courts have turned to *Restatement (Second) of Torts* for the governing traditional common law principles. The court of appeals below looked to Section 433A for when joint and several liability is or is not appropriate. But as Petitioners have pointed out, it failed to heed comment g to Section 433A to look to Section 433B for "the burden of proof, and the effect of failure to produce evidence justifying the apportionment." Pet. 24-26.

In trying to cope with Section 433B, the Government does not dispute the proposition that under the *traditional* common law the burden of proof of apportionment is upon the plaintiff, not the defendant, when both have contributed to the harm. Instead, it seeks to evade the traditional common law by several manuevers. First, it excises the words "traditional and" from Senator Randolph's statement. U.S. Br. 13.[4] Second, it argues for selective use of only some of the traditional principles:

> Congress' instruction to the courts to apply "evolving principles of common law" was not tantamount to requiring courts to apply to CERCLA every statement and every explanation contained in the Restatement.

---

[4] The Government also argues that the term "the proved tort feasor," in comment (d) to Section 443B has no relevance to CERCLA because "the government is not required to make a traditional showing of fault or causation." U.S. Br. 15 n.11. But "tort feasors" are the very words Senator Randolph used in the quote above when referring to the common law that was to determine when joint and several liability was appropriate under CERCLA. Furthermore, the Government's argument ignores its burden of proving the elements of statutory liability and the kind of evidence relevant to the availability of defenses which relate directly to notions of causation and fault. *See* CERCLA § 107(a)(3),(b)(3), 42 U.S.C. § 9607(a)(3), (b)(3).

U.S. Br. 14-15 n.11. But the American Law Institute in its restatements crafts the "black letter" and the comments as a seemless web. Moreover, the Government does not say what is to guide courts in this case-by-case picking and choosing among traditional common law principles. The Government's novel selective acceptance theory is quintessential "standardless delegation."

The Government's third reason why it should not bear the burden of proving apportionment where it is also a "responsible party" is that a special exception from the common law rules applicable to other CERCLA plaintiffs should be made where it is the plaintiff. This argument is "Orwellian". George Orwell in *Animal Farm* refers to the rule in that mythical land that

> All animals are equal,
> But some animals are more equal than others.

Here the Government concedes that CERCLA intends "each department, agency, and instrumentality of the United States" can be liable "persons" under the Act. But then it argues that its agencies become liable "persons" within the context of the Act's liability and contribution provisions "only after all questions of liability and remedy have been resolved." U.S. Br. 8. As support for this curious proposition, the Government refers to a statement in the House Judiciary Committee Report:

> The right of the United States to proceed under § 106 or 107 is unaffected by its status as an owner or operator of a facility or a generator of waste at the site.

U.S. Br. 8. But all this statement does is clarify that the Government's right to commence a suit is not inhibited by its own liability, *e.g.*, the Government's liability is not a complete defense analogous to contributory negligence. Moreover, as pointed out in the Petition, the Senate clearly and decisively rejected the Government's pleas for universal bifurcation of liability and contribution issues either in separate suits or separate trials in the same suit. Pet. 16-17. In any event, in the face of the clear statutory

language in CERCLA Section 113(f)(1),(2) giving "any person" a right to seek contribution from any other person who is liable or potentially liable under section 107(a), *during or following any civil action* under . . . section 107(a)," the courts have no power to consult the legislative history to insert an amendment into the text. (Emphasis added.) *Cf. Chan v. Korean Air Lines*, 109 S.Ct. 1676 (1989) (Although a treaty's drafting history might be consulted to elucidate a text that is ambiguous, courts have no power to insert an amendment into the treaty where the text is clear).

Finally, any notion that the Government can separate itself into two separate, independent entities (EPA as plaintiff "protector of the public" and EPA, the Army, and its other agencies as defendant "polluters") in a single legal proceeding has been disavowed by the Government elsewhere and rejected by this Court in other contexts. Pet. 14-15. Indeed, the "potentially liable person" referred to in the statute is the United States Government. 42 U.S.C. § 9601(21).

The Implications of the Secret Settlements

Petitioners have argued that the judgment below should be set aside because it has not been reduced to reflect settlements among the plaintiffs and other settling parties. In partial response, South Carolina reveals that it has made payment to the Government for reimbursement of response costs at Bluff Road. But it concedes "that the amount paid should result in a reduction of the judgment." S.C. Br. 8. Similarly, the Government reveals that EPA has also accepted payments from certain other federal agencies. U.S. Br. 3 n.1.

The intergovernmental settlements between the Government and South Carolina and among the governmental agencies are in addition to two settlements of which Petitioners were previously aware in which the Government accepted payment for the same costs covered by the judgment here. Pet. 19-20. The Government also concedes that these settlements "would reduce the total amounts due the governments." U.S. Br. 11 n.8. This statement is, however, misleading for two reasons. First, the amount of the judgment entered by the district court did not reflect all settlements

approved by the district court prior to entry of final judgment.[5] Second, the Government now reveals that it has accepted payment from its own federal agencies. Thus, it will attempt to block Petitioners from recovering payments from these agencies in the contribution action which the Government below maintained was available. U.S. Br. 3 n.1.[6] The attempt to obtain double recoveries and to avoid court determination of the fair shares of the Government departments and agencies as waste generators through self-dealing is flatly contrary to the statute, *see* 42 U.S.C. § 9614(b), and equitable principles.

Part I, C of the Petition discusses the likely consequences to Petitioners of the "two actions" procedure forced on them by the district court. The bottom line is that they probably will end up saddled with far more than their fairly apportioned share of liability. The Respondents off-the-record intergovernmental settlements make this result virtually inevitable.[7]

---

[5] The district court entered a settlement between the Government and Columbian Organic Chemical Company specifically stating that claims against the other defendants would be reduced by the amount of the settlement. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1010 (D. S.C. 1985). Although the United States represents that such a reduction occurred, U.S. Br. 11 n.6, an examination of the accounting of costs on which the final judgment was calculated and the amount of that judgment clearly demonstrates that no such reduction occurred. The settlement with AquAir Corporation entered by the Fourth Circuit without any hearing, though one had been requested by Petitioners, dismissed the judgment against AquAir for $1,561,134.55 in exchange for a payment of $5,000, without reduction of the judgment against Petitioners. Pet. 19; S.C. Br. 8.

[6] Joint Answer of the United States and South Carolina Department of Health and Environmental Control to Petitions for Rehearing and Suggestion for Rehearing in Banc, *United States v. Monsanto*, Nos. 86-1261(L), 86-1263, 86-1265 (4th Cir., brief filed Oct. 7, 1988), at 8 n.1 ("Where governmental agencies resolve their responsibility to reimburse the Superfund they would be entitled to contribution protection, 42 U.S.C. 9613(f)(2) . . . .").

[7] The Government argues that, "Contrary to the fears expressed by Petitioners . . . district courts can exercise this discretion in a manner that . . . avoids unfairness where unfairness would otherwise result, a district court could simply bifurcate the Government's case-in-chief and contribution claims,

Respondents take the position that they can enter into "administrative" settlements between their "potentially responsible" agencies and thereby extinguish contribution claims against them.[10] While respondents asserted this position in the Fourth Circuit, they did not advise the court or Petitioners of all such settlements. Yet the lynchpin of the majority opinion's reason for denying or not addressing the constitutional arguments raised below was the court's assumption that "the Respondents still have the right to sue responsible parties for contribution and in that action may assert both legal and equitable theories of cost allocation." Pet. App. B-22. Elsewhere in the opinion, unaware of the off-the-record settlements, the court also stated:

> We also observe that the EPA has contributed upwards of $50,000 to the Bluff Road cleanup, and that any further claims against EPA and other responsible government instrumentalities may be resolved in contribution action pursuant to CERCLA section 113(f).

Pet. App. B-22 n. 28.

The net effect of the opinion below and the off-the-record intergovernmental settlements is likely foreclosure of any "opportunities for contribution . . . as well as joinder or interpleader of responsible parties" cited by the majority below as a means of preventing transformation of an "otherwise constitutional obligation into one that exacts punishment." Pet. Br. App. B-25, 26 n.33.

---

instead of deferring contribution to a subsequent action." U.S. Br. 10. What the Government fails to note is that avoidance of unfairness is the precise reason why Rule 54(b) requires a court to find that "there is no just reason for delay" *before* it can require bifurcation into two separate actions. Here it could not have made such a finding because it needed to maintain control of the award of the amount of damages so that it could adjust that amount in light of its apportionment of responsibility for the harm *later in the same proceeding*.

[8] *See* note 6, *supra*.

Conclusion

The decision below and the newly revealed intergovernmental settlements portend the ultimate incidence of grossly disproportional liability in this case and in future CERCLA cases. These discriminatory results are contrary to the equitable allocation of CERCLA liability Congress intended. In extreme circumstances, if the ultimate incidence bears no rational relationship to a defendant's fairly allocated contribution to the harm, it may be unconstitutional. Pet. 21-23. *Cf. United States v. Halper*, 109 S.Ct. 1892 (1989) (discussing the constitutional line between permissible civil remedy and prohibited punishment).

Respectfully Submitted,

George C. Freeman, Jr.
(Counsel of Record)
Alfred R. Light
Thomas E. Knauer

APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES,

PLAINTIFF,

CIVIL ACTION
No. 88-0201 L(J)

v.

DONALD E. DISTLER, et al.,

DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the court on the motion of Kurfees Coatings, Inc. ("Kurfees") to file a third-party complaint. The United States brought this action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607 (1988), to recover costs expended in remedying improper disposal of hazardous wastes in Hardin County, Kentucky. Jurisdiction is proper pursuant to 28 U.S.C. § 1345 (1988).

Kurfees contends that in 1984 it bought the assets of Louisville Coatings, Inc. As part of the sale agreement, Louisville Coatings warranted there was no litigation or governmental investigation pending nor any known basis for any litigation or investigation. Kurfees contends that Louisville Coatings is liable for contribution or indemnity of any claim against them, either because of the contract or because any wrongful acts were committed by Louisville Coatings. It seeks to add a third-party claim against them.

The United States objects for two reasons. First, it claims that because of the strict liability provisions of CERCLA, a third-party claim would be unwarranted until a judgment has been entered against Kurfees. Second, the United States contends that allowing the defendants to lengthen and complicate the proceeding would defeat the intent of CERCLA, which is to provide a speedy and efficient mechanism to reimburse the United States for its clean-up expenses. Neither ground is persuasive.

Fed. R. Civ. P. 14(a) states that "at any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." The defendant need not wait until the claim against him is reduced to a judgment; he may bring a third-party action for contribution or indemnity when it appears the facts give rise to that claim. 6 C. Wright and A. Miller, Federal Practice and Procedure § 1446 (1971). It may be that Kurfees has no claim against Louisville Coatings, but it is much too early for this court to tell. The third-party claim is not too speculative or frivolous to file.

Further, the court has other means at its disposal to prevent third-party claims from delaying or complicating the case. The court may bifurcate the trial or order discovery undertaken in different phases. The court is confident that the third-party claim will not impede a just and expeditious resolution of this action. Therefore,

IT IS ORDERED that defendant Kurfees Coatings, Inc.'s motion to file a third-party complaint is GRANTED.

DATED 1-31-89

Edward H. Johnstone, Chief Judge

United States District Court
Entered Feb. 2, 1989

cc: Counsel